No. 77-1499

FILED
APR 20 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. NELLIS
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement of the Case 4

Reasons for Granting this Writ 5

TABLE OF CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 7

DeSacia v. State, 469 P.2d 369, 370-381 (Alaska, 1970) 8, 9

Dunn v. United States, 284 U.S. 390 (1932) 2, 5, 6, 7, 8, 9, 10, 12

Sealfon v. United States, 332 U.S. 575 (1948) 6, 7

United States v. Fox, 433 F.2d 1235, 1239 (D.C. Cir., 1970) 10

United States v. Vastine, 363 F.2d 853, 855 (3d Cir., 1966) 10

MISCELLANEOUS

"Inconsistent Verdicts in a Federal Criminal Trial", 60 Col. Law Rev. 999 (1960) 7, 8

"*Ashe* v. *Swenson*: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts", 71 Col. Law Rev. 321 (1971) 8

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO.

FRANK P. NORTH, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Frank P. North, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on ~~March 21, 1978.~~ Dec. 12, 1977. (?)

Opinions Below

The opinion of the United States Court of Appeals is unreported and is printed in Appendix D of the Joint Appendix filed herewith by the petitioner, and by four other simultaneous petitioners (Robert Craig, Louis A.

Markert, Jack E. Walker and Peter V. Pappas), at pages App. 59-151 of the Joint Appendix. The judgment of the United States Court of Appeals is printed in Appendix E at page App. 152 of the Joint Appendix.

Jurisdiction

The opinion and decision of the United States Court of Appeals was entered on December 12, 1977 (App. D, pages App. 59-151 of Joint Appendix). A timely petition for rehearing was denied on March 21, 1977 (App. E, page App. 152 of Joint Appendix). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether this Court should reconsider and abandon the established precedent of *Dunn* v. *United States*, 284 U.S. 390 (1932), which permits a legally and factually inconsistent verdict in a criminal prosecution upon a multi-count indictment.

2. Whether the questions presented by three other simultaneous petitioners (Robert Craig, Jack E. Walker and Peter V. Pappas), to the extent applicable to this petitioner, should be reviewed on writ of certiorari. (Petitioner, in the interest of avoiding duplication, respectfully asks for permission to adopt the petitions of those three other petitioners, except to the extent their questions presented are not applicable to him.)

Statutes Involved

The statutes involved are the 3 provisions of Title 18, United States Code, cited in the indictment. 18 U.S.C. §371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud

> the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor".

18 U.S.C. §1341 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. §1952(a) provides:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Statement of the Case

The facts material to consideration of the questions presented, and the basis for federal jurisdiction in the court of first instance, are adequately summarized in the opening part of the opinion of the United States Court of Appeals (App. D, pages 59-80 of Joint Appendix).

Reasons for Granting this Writ

Upon the question now presented by petitioner, the Court of Appeals acted with dispatch (App. D, page App. 124 of Joint Appendix):

> "North also contends that the jury reached a legally and factually inconsistent verdict with respect to him. This argument, however, has been rejected on previous occasions by this court, and we reject it here. *E.g. United States* v. *Serbins,* 538 F.2d 737, 747 (7th Cir. 1976); *United States* v. *Greene,* 497 F.2d 1068, 1085-86 (7th Cir. 1974); *United States* v. *Tankersley,* 492 F.2d 962 (7th Cir. 1974)."

That conclusion, as does the same conclusion reached by numerous federal judges in the past 46 years, finds its origin in the established precedent of *Dunn* v. *United States,* 284 U.S. 390 (1932), in which Mr. Justice Holmes delivered the opinion of the Court (excerpt at 393-394):

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen,* 5 Best & Smith 635, 642, 643. *Selvester* v. *United States,* 170 U.S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler* v. *United States,* 7 F.(2d) 59, 60:
>
> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were

> not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'
>
> "Compare *Horning* v. *District of Columbia*, 254 U.S. 135.
>
> "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

It is the position of petitioner, a position recognized by persuasive authority, that the *Dunn* precedent has been stripped of its foundation, is an incorrect rule of law and, to promote federal criminal jurisprudence, should be discarded in favor of the dissenting view of Mr. Justice Butler in *Dunn* (at 407):

> "The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the findings may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for defendant upon an assumption of power it might not lawfully exert."

Two *res judicata* rulings by this Court reveal the absence of any substantive foundation for the rule established by the *Dunn* majority. In *Sealfon* v. *United States*, 332 U.S. 575 (1948), this Court ruled that an earlier acquittal of conspiracy provided a complete *res judicata* de-

fense to a later prosecution for the related substantive offense, under the circumstances presented (at 580):

> "So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be nonexistent. That the prosecution may not do."

The second ruling is *Ashe* v. *Swenson*, 397 U.S. 436 (1970), which involved multiple robbery-theft charges and trials arising from an alleged single robbery of multiple victims (and an incidental car theft). In *Ashe* this Court extended "collateral estoppel", as part of the guaranty against double jeopardy, to state prosecutions. The issue in *Ashe*, as stated by Mr. Justice Stewart for the majority, was ". . . simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again" (at 446).

While *Sealfon* and *Dunn* demolish the *dictum* of Mr. Justice Holmes which supports the *Dunn* precedent, relative to *res judicata*, those later rulings do not reach the question at bar, whether *Dunn* itself should be preserved or abandoned. That issue was explored at length in an article entitled "Inconsistent Verdicts in a Federal Criminal Trial", 60 Col. Law Rev. 999 (1960),[1] and its author concluded (at 1009):

> ". . . The several cases that have held that *Sealfon* does not affect *Dunn* because collateral estoppel cannot apply at a single trial, seem to have overlooked that any connection between the two cases inheres in the state-

[1] The article also demonstrates the great disparity among state courts upon this issue. Footnote 18 on pages 1002-1004. See also an annotation at 18 ALR 3d 274-282.

ment in *Dunn* that the rule of consistency for consecutive criminal actions must apply to single trials of multiple counts. The Court in *Dunn* seemed to think that the joinder of counts for the convenience of trial should confer on the defendant no greater rights than those he would have if the counts were tried separately. Since *Sealfon* effectively prevents a conviction that is inconsistent with a prior acquittal, continued alherence to *Dunn* deprives the defendant of a right he would have if the counts had been tried separately. The underlying principle of *Dunn* suggests that the specific conclusion there reached should no longer be followed, so that a defendant in a multiple count trial will have rights equal to those of a defendant successively tried. It is not unlikely, therefore, in view of the *Sealfon* decision, and because of the failure of the consideration of jury leniency to provide any effective support for *Dunn*, that the Supreme Court will refuse to adhere to that decision when the question is again presented."

Compare similar conclusions in "*Ashe* v. *Swenson:* Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts", 71 Col. Law Rev. 321 (1971), at 334.

The issue whether or not to follow *Dunn* was addressed to the Supreme Court of Alaska in *DeSacia* v. *State,* 469 P.2d 369, 370-381 (Alaska, 1970), and the 5 Supreme Court Justices were unanimous in their repudiation of *Dunn* and its progeny. The Court instead, upon analysis of the federal rule, decided that the verdict must be rational (at 377-378):

> ". . . Although the assertion that juries have traditionally not been required to render consistent verdicts is itself subject to some doubt, our disagreement with the logic underlying the federal rule on inconsistent jury verdicts is not of a historical nature. Rather, we can see no basis to assume, as was assumed in *Dunn,* that inconsistent verdicts are the product of a jury's disposition toward treating the accused leniently; nor can we see a basis for assuming that, in allowing inconsistent jury verdicts in criminal trials to stand, we run only 'the risk that an occasional conviction may have been the result of compromise.' The truth is simply that we do not know, nor do we have any way of telling, how many inconsistent verdicts are attributable to feelings of leniency, to compromise, or, for that matter, to outright confusion on the part of the jury.
>
> • • •
>
> ". . . As a matter of fact it might be possible to speculate indefinitely as to what paths the jury followed in reaching its conclusions in this case. The point is that we have no reliable way to discover what really lies behind the inconsistent verdicts; and any conclusions—any assumptions on our part—would not be warranted.
>
> "What we do know, however, is that the verdict of the jury convicting DeSacia on count II of the indictment is inconsistent, and necessarily so, with the acquittal in count I. This result is irrational. In our system of criminal procedure, both at trial and on appeal, the entire focus of the fact-finding effort is upon a reasonable solution of factual issues. Accordingly, the language of our cases centers upon the element of reason. For example a jury will not be allowed to convict a person accused in a criminal matter unless it finds guilt to be established beyond a *reasonable* doubt. A trial court judge must enter a judgment of acquittal if he determines that fair-minded men cannot *reasonably* differ on the question of whether there is a *reasonable* doubt as to the defendant's guilt. We can conceive of no reason why, under these circumstances, we cannot require at the very least, a minimal degree of reasonableness in the rendering of jury verdicts."

The unchallengeable logic and substance of the *DeSacia* ruling merits full review by this Court, which alone can remove the bridle of *Dunn.* As Circuit Judge William H. Hastie expressed it, ". . . a judge of an inferior court

can do no more than express his hope that the rule of the *Dunn* case will soon be reconsidered and abandoned." *United States* v. *Vastine,* 363 F.2d 853, 855 (3d Cir., 1966, concurring opinion). See also the concurring opinion of Chief Judge David L. Bazelon in *United States* v. *Fox,* 433 F. 2d 1235, 1239 (D.C. Cir., 1970).

The case at bar presents a very appropriate vehicle for re-examination of the *Dunn* precedent. The verdict with respect to petitioner corresponded to the indictment in the following manner (Rec. 1, 224):

Count of Indictment	Alleged Violation	Alleged Dates	Verdict
1	Conspiracy to Commit Mail Fraud (18 U.S.C. §371)	Jan. 6, 1971 to Dec. 4, 1974	Guilty
2	Mail Fraud (18 U.S.C. §1341)	Nov. 18, 1971	Not Guilty
3	Mail Fraud	Nov. 18, 1971	Not Guilty
4	Mail Fraud	Nov. 18, 1971	Not Guilty
5	Mail Fraud	Dec. 28, 1971	Not Guilty
6	Mail Fraud	Mar. 24, 1972	Not Guilty
7	Mail Fraud	Mar. 24, 1972	Not Guilty
8	Mail Fraud	April 27, 1972	Not Guilty
9	Mail Fraud	May 1, 1972	Not Guilty
10	Mail Fraud	June 22, 1972	Guilty
11	Mail Fraud	June 23, 1972	Guilty
12	Mail Fraud	Sept. 28, 1972	Guilty
13	Interstate Travel to Promote Bribery (18 U.S.C. §1952)	Feb. 29, 1972	Not Guilty
14	Interstate Travel to Promote Bribery	Mar. 1, 1972	Not Guilty

A review of the basic evidence pertaining to petitioner reveals that rational consistency could only produce an identical verdict (acquittal or conviction) upon all 14 counts. See App. D, pages App. 117-118 of Joint Appendix. According to the evidence, the *only* mention of the "cement bill" to petitioner (before postal inspectors visited him on June 3, 1974) was by government witness Pete Pappas, who testified about their conversation shortly before the meeting of the Illinois Motor Vehicle Laws Commission on November 8, 1971, possibly while they were drinking at the Mansion View: "I told him that I had something going on the cement bill and it was going to be in the Commission meeting. He said, 'Fine'" (Tr. 1065-1068). The prosecution evidence next discovered and touched petitioner more than 10 months later. According to witness Pappas, he telephoned petitioner (an extremely close friend, according to the evidence, with pressing financial needs because of an intensively disputed re-election campaign) in the early or middle part of September, 1972 and "I told him of my call from Peter V. and then I told him that if he could make the meeting at the Coffeehouse, I would have something for him. He said he thought he could and I said okay, fine" (Tr. 1136). When witness Pappas and Donald Carpentier (another government witness) arrived at the Coffeehouse seveal days later, petitioner was inside and, per the testimony of Pappas: "We sat down, had a cup of coffee and just had sort of a general conversation while we were waiting for Peter V." (Tr. 1137). Both before and after witness Pappas handed $1,000 cash to petitioner that day, there was no conversation or other communication involving petitioner (with witness Pappas, or with witness Carpentier, or with anybody else) which in any way connected the $1,000 cash to the "cement bill". The only possible evidence of that connection in 1971 or 1972,

which at all involved petitioner, was the above evidence of his conversation with witness Pappas on or about November 8, 1971. Petitioner was therefore responsible from inception, or not at all.

The inconsistent verdict as to petitioner demonstrates confusion and prejudice by the jury, resulting from the government's rebuttal closing argument. See App. D, pages App. 120-125 of Joint Appendix. Indeed the Court of Appeals recognized that the jury was misinformed when "... the prosecutor stated a concededly erroneous version of that conversation: '... North was told by Pete Pappas 'there will be something for you on the cement bill,' or 'there is something for you on the bill,' ... North sought to no avail to have the trial judge correct this misstatement" (App. D, page App. 122 of Joint Appendix). Acting upon such uncorrected and crucial misinformation, at the end of a nearly 10-week trial, the jury deliberated for 3 days and then returned a verdict which, as to North, is neither rational nor consistent.

Petitioner respectfully requests this Court to reconsider and abandon *Dunn*, and to reverse his conviction.

Respectfully submitted,

WILLIAM J. NELLIS
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioner
Frank P. North, Jr.